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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAR 29 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Tariff Filing Requirements for) CC Docket No. 93-36
Nondominant Common Carriers)

To: The Commission

**COMMENTS OF
MCCAW CELLULAR COMMUNICATIONS, INC.**

McCaw Cellular Communications, Inc. ("McCaw") hereby submits its comments in response to the above-captioned Notice of Proposed Rulemaking.¹ As detailed below, McCaw strongly supports the Commission's efforts to streamline the tariff filing rules for domestic nondominant common carriers -- including cellular carriers -- to the maximum extent possible consistent with the Communications Act. By doing so, the Commission would further the public interest by preserving the highly competitive nature of the mobile communications marketplace.

**I. MCCAW SUPPORTS STREAMLINED NONDOMINANT
TARIFF FILING PROCEDURES FOR CELLULAR CARRIERS**

As McCaw explained in the attached comments filed in support of the Cellular Telecommunications Industry Association's ("CTIA") Request for Declaratory Ruling and

¹ Tariff Filing Requirements for Nondominant Common Carriers, FCC 93-103 (Feb. 19, 1993) ["Notice"].

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Petition for Rulemaking,² the wholesale extension of tariffing regulation to cellular carriers is both unprecedented and unwarranted. Indeed, wireless services such as cellular have never been tariffed, even before the advent of the Commission's forbearance policy. Traditional tariff regulation not only is unnecessary in the fast-growing and competitive mobile marketplace, it would be counterproductive.

In its comments on the CTIA Petition, McCaw discussed that the cellular industry is characterized by robust competition as a result of facilities-based competition. The increasing availability of services that are interchangeable with cellular, such as services now offered by Enhanced Specialized Mobile Radio ("ESMR") licensees, and the impending introduction of personal communications services ("PCS") will insure continued vigorous competition.³ Consequently, cellular carriers should be declared nondominant and made subject to the maximum streamlined tariffing rules adopted in this docket.

² CTIA Request for Declaratory Ruling and Petition for Rulemaking, (filed Jan. 29, 1993) ("CTIA Petition"); see Public Notice, Report No. 1927 (Feb. 17, 1993).

³ For example, Fleet Call, Inc., announced that it is

The Commission is clearly correct in tentatively concluding that the imposition of existing tariff filing requirements on nondominant carriers would seriously undermine the healthy competitive environment for cellular services by inhibiting service innovation, market entry and customer responsiveness.⁴ Full-blown tariffing requirements would result in higher costs to subscribers by establishing clear price floors and removing incentives to reduce rates. Moreover, the traditional tariffing process would harm the industry by enabling competitors to impose additional costs and delays on other carriers. Nondominant carriers subject to federal tariffing requirements should thus be given the maximum streamlined treatment lawfully permitted under the Communications Act.

Specifically, McCaw supports the proposed one day notice period for interstate domestic tariffs. Such a reduction satisfies the Commission's informational needs and the requisites of the Communications Act while allowing cellular carriers sufficient flexibility to respond to changing market conditions. McCaw also supports the proposal to permit nondominant carriers "to state in their tariffs either a maximum rate or a range of rates".⁵ Such rate structures would grant cellular carriers the continued opportunity to

⁴ Notice at ¶ 12.

⁵ Notice at ¶ 22.

respond competitively by lowering prices to meet subscriber demands.

While McCaw applauds these important steps to reduce the tariff filing burdens on cellular carriers, it respectfully requests Commission clarification of the Section 203(a) tariffing requirements. For example, Section 203(a) states that a carrier must file "schedules showing all charges for itself and its connecting carriers and showing the classifications, practices, and regulations affecting such charges."⁶ While the Commission proposes "to require nondominant common carriers to include in their tariff only the information required under this section of the Act,"⁷ it does not provide any guidance as to exactly what that information may be.

McCaw urges the FCC to elaborate on its interpretation of the Section 203(a) requirements rather than encouraging carriers to file tariffs in accordance with their own interpretation. A Commission pronouncement would provide nondominant carriers with a safe harbor, as an agency's construction of its governing statute is entitled to substantial deference on judicial review.⁸ Moreover, McCaw

⁶ 47 U.S.C. § 203(a) (1991).

⁷ Notice at ¶ 21.

⁸ Chevron USA Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837 (1984).

submits that a narrow interpretation of the Section 203(a) requirements is justified given the intensely competitive nature of the wireless industry.

Finally, McCaw believes that the Commission should continue to allow cellular carriers to cross-reference other tariffs on file.⁹ Cross-referencing would further reduce filing burdens and, thereby, enable cellular carriers to efficiently and expeditiously serve the needs of the public.

II. CONCLUSION

Absent Commission action, the competitive and still developing wireless industry will be burdened with intrusive, unprecedented and unwarranted tariffing requirements. The wholesale extension of such obligations would improperly ignore the Commission's fundamental policy findings. Moreover, the imposition of traditional tariff requirements on cellular carriers would be regressive, seriously hindering the development of the industry and impeding competition in the mobile communications marketplace.

For these reasons, McCaw supports the Commission's efforts to streamline the tariffing requirements for nondominant carriers to the extent lawfully permitted under the Communications Act, and requests that the Commission

⁹ See Petition for Waiver of Part 61 of the Commission's Rules, DA 93-196 (released Feb. 19, 1993).

affirmatively but narrowly interpret the requirements of
203(a) of the Communications Act.

Respectfully submitted,

MCCAW CELLULAR COMMUNICATIONS, INC.

BY: *Donal K. Morrison / lnc*

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 1993, I caused copies of the foregoing "Comments of McCaw Cellular Communications, Inc." to be mailed via first-class postage prepaid mail to the following:

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Evelyn Ramos

ATTACHMENT A

In the Matter of
Policies and Rules
Pertaining to the
Regulation of
Cellular Carriers

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OFFICE OF THE SECRETARY

March 19, 1993

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In the Matter of)
)
 Policies and Rules)
 Pertaining to the) RM-8179
 Regulation of)
 Cellular Carriers)
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)

McCaw Cellular Communications, Inc. ("McCaw") hereby submits its comments in support of the Cellular Telecommunications Industry Association's ("CTIA") above-captioned Request for Declaratory Ruling and Petition for Rulemaking.¹ McCaw welcomes CTIA's Petition as a timely effort to address a number of important issues affecting the applicability of federal tariffing requirements to cellular carriers. Prompt and favorable Commission action is warranted to minimize adverse and unintended consequences of the AT&T v. FCC decision for cellular services.²

² American Telephone and Telegraph Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992).

I. INTRODUCTION AND SUMMARY

CTIA requests clarification that cellular carriers are non-dominant under the Commission's rules and proposes use of streamlined tariff procedures where cellular filings are legally required.³ CTIA also seeks reaffirmation from the Commission that many cellular services are not subject to federal tariffing obligations.

McCaw supports CTIA's Petition because the highly competitive nature of the mobile marketplace renders traditional tariff regulation for cellular services inappropriate and contrary to the public interest. Cellular licensees in each market compete vigorously in terms of price, service quality, and ancillary capabilities. Moreover, they face increased competition from a variety of alternatives to existing cellular services, such as specialized mobile radio ("SMR") and enhanced SMR ("ESMR") systems, personal communications services ("PCS"), and the landline telephone network. The imposition of tariffing requirements on the cellular industry would only stunt its development and impede competition in the mobile communications marketplace.

³ See 47 U.S.C. §203 (1991). The Commission has already issued a Notice of Proposed Rulemaking tentatively concluding that the relief CTIA requests from the existing non-dominant tariffing rules should be granted. Tariff Filing Requirements for Non-Dominant Common Carriers, CC Docket No. 93-36 (released Feb. 19, 1993).

It follows that those few cellular services subject to federal tariff requirements should be given the maximum streamlined treatment lawfully permitted under the Communications Act. This will rightfully minimize the burdens placed on cellular carriers. Just as significantly, a light-handed tariffing scheme will reduce regulatory disparities between cellular carriers and other competing mobile service providers not subject to tariff obligations under the Act and Commission policies.

The characteristics of mobile service also require special consideration under Section 221(b) of the Act.⁴ Cellular operators provide telephone service to their subscribers using radio communications, and "radio signals cannot recognize nor stop at a state line ..."⁵ Thus, the Commission should clarify that such cellular exchange service remains exempt from federal tariffing requirements.

**II. THE HIGHLY COMPETITIVE CELLULAR MOBILE
MARKETPLACE SHOULD NOT BE UNDERMINED
BY UNNECESSARY TARIFFING REQUIREMENTS**

As the largest cellular telephone company in the United States, McCaw has endeavored to realize the Commission's stated objective of "serv[ing] the public interest by

⁴ 47 U.S.C. §221(b) (1991).

⁵ ATS Mobile Tel. v. Curtin Call Comm., Inc., 232 N.W.2d 248 (Neb. 1975) (citations omitted).

implementing a nationwide high-capacity mobile communications service."⁶ Facilitated by the Commission's pro-competitive regulatory policies and driven by consumer demand, the cellular industry has experienced explosive growth and has presented the public with an exciting array of new services. This expansion has created new jobs, new opportunities and increased competition in the mobile marketplace.

Unfortunately, the cellular industry now faces substantial uncertainty regarding the applicability of federal tariffing requirements. McCaw believes that the unprecedented wholesale extension of tariffing regulation to cellular carriers is completely unwarranted. Tariffing of some variety is the traditional means of protecting the interest of consumers from abusive conduct by an established monopoly providing an essential service. But tariffing is unnecessary in a marketplace that is fast-growing and competitive even if not "perfectly" competitive as defined in economic theory. In a competitive marketplace, tariffing establishes a clear price floor and removes incentives to reduce rates.⁷ The tariffing process itself provides

⁶ Cellular Communications Systems, 86 F.C.C. 2d 469, 502 (1981).

⁷ It has been suggested that California's principal cellular markets continue to experience higher cellular rates than the rest of the nation largely because the detailed tariff regulation imposed in that state discourages vigorous price competition.

competitors with a strategic resource to impose additional costs and delays on other carriers.

Moreover, as the Commission is aware, an overly burdensome tariffing regime acts like a wet blanket thrown across an entire industry. Young companies, like McCaw, that are required to operate leanly to compete, lack the internal bureaucracy dictated by full-blown tariffing. Without relief from the Commission, McCaw and other cellular carriers would be required to divert revenues from the development and deployment of services to add a new layer of administration to handle tariffing. In addition, carriers will become less responsive to customer needs and less agile in meeting competition. The Commission too, would be faced with the prospect of heaping additional work upon its overburdened staff or spending scarce dollars to add more people to process more paper. Both the industry and the public would be ill-served by such a result.

Cellular is a competitive, dynamic industry today, and will only become more and more competitive in the foreseeable future. Two independent cellular licensees in each service area compete vigorously in terms of price, service quality, geographic coverage, and availability of ancillary offerings. The carriers have no captive ratepayers; to the contrary, industry statistics show that customers frequently elect to switch providers, or even terminate their service altogether,

if they are dissatisfied with the price or quality of their service.

Cellular carriers are also subject to effective competition from numerous cellular resellers. As the FCC has recognized, cellular subscribers have multiple choices regarding "technology, service offerings, and service price" from which to meet their mobile communications needs.⁸ Indeed, in recent written testimony before the California legislature, the Chief of the Common Carrier Bureau affirmed the successful competitive development of cellular and other wireless services.⁹

As that testimony further attests, cellular carriers face additional competition from a variety of wireless alternatives to cellular.¹⁰ Enhanced SMR providers such as Fleet Call, Inc., which are authorized to operate in numerous markets nationwide, have been given significant new freedoms and can now provide services that are functionally equivalent to cellular.¹¹ Several wireless data services, both one-way

⁸ Bundling of Cellular Customer Premise Equipment and Cellular Service, 7 FCC Rcd 4028, 4029 (1992).

⁹ Testimony of Cheryl A. Tritt, Hearing before the Senate Committee on Energy and Public Utilities, California Legislature, January 12, 1993 (copy attached).

¹⁰ Id. at 2-3.

¹¹ See Request of Fleet Call, 6 FCC Rcd 1533 (1991); Press Release, "FCC Eliminates Separate Licensing of End Users of Specialized Mobile Radio Systems," Report No. (continued...)

and two-way, have also recently entered the marketplace; these services compete with cellular for a large segment of customers whose mobile communications needs focus on the ability to send and receive text and data rather than communicate only by voice. In addition, the FCC has proposed to grant national 900 MHz SMRs licenses to be used for both voice and data mobile services.¹²

The Commission has also proposed to authorize at least three new PCS providers in each market "as a way of introducing additional competition to current mobile radio services."¹³ PCS and cellular licensees are expected to "compete on price and quality."¹⁴ Other direct competitors to various cellular services include the mobile satellite services and certain landline alternatives for interstate long distance calling.

¹¹(...continued)
DC-2197, released August 5, 1992; Fleet Call, Inc., Petition for Rulemaking, RM-7985, filed April 22, 1992.

¹² Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, Docket No. 89-553 (released Dec. 18, 1989) (Notice of Proposed Rulemaking); First Report and Order and Further Notice for Proposed Rulemaking, Docket No. 89-553 (released Feb. 12, 1993).

¹³ Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd 5676, 5688 (1992).

¹⁴ Id. at 5701.

Significantly, many of these service providers are or may be considered private carriers, free from federal and state regulations. The application of traditional tariff requirements to cellular carriers would undermine competition and create significant market distortions by imposing heavy administrative costs exclusively on the cellular industry and its subscribers. Dominant carrier filing requirements would pose a particularly ominous threat to the free market by forcing cellular carriers to share confidential cost and pricing data with their competitors. Consequently, the private carrier mobile service providers would enjoy a distinct competitive edge in pricing their offerings, designing service plans, and marketing them to the public.

It follows that, to the extent the FCC is forced to impose some form of tariffing on cellular carriers as a result of the court's decision -- at least until that ruling is reversed or legislative relief is obtained -- it should be the least onerous regulation necessary to satisfy statutory requirements. Cellular carriers should be afforded at least as much streamlining as will be provided to non-dominant carriers. The full, fair and effective competition that would arise from keeping all competitors on an equal regulatory footing would benefit the public through the availability of a greater range of diverse services at lower prices.

**III. ANY CELLULAR SERVICES WHICH MUST BE TARIFFED UNDER THE
ACT QUALIFY FOR STREAMLINED NON-DOMINANT TREATMENT**

**A. The Competition Faced By Cellular Carriers
Demonstrates That They Lack Market Power
And Are Consequently Non-Dominant**

While the Commission has previously opined that cellular carriers are dominant in some respects,¹⁵ it has never undertaken the required market power analysis to determine whether that status is truly warranted. In fact, the Commission has conceded as much in granting an interim waiver of the dominant carrier tariffing rules for cellular companies.¹⁶ McCaw submits that an examination of today's cellular market permits only one conclusion -- that cellular carriers merit non-dominant treatment.

The rapid growth of both cellular services and substitutable offerings from other wireless service providers demonstrate that there are no significant barriers to entry in the mobile marketplace. The fact that in a young industry, like cellular, system capacity has been expanding substantially -- and that cellular service accounts for no more than five percent of the total telecommunications

¹⁵ See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (Fifth Report and Order), 98 F.C.C. 2d 1191, 1204 n.41. (finding cellular carriers dominant but possessing a limited ability to engage in anticompetitive conduct or cost-shifting).

¹⁶ Petition for Waiver of Part 61 of the Commission's Rules, DA 93-196 (released Feb. 19, 1993).

market, and less than one percent of the interexchange market¹⁷ -- confirms that opportunities remain for new entrants. As CTIA notes,

[i]t makes little sense to confer non-dominant status on an interexchange carrier the size of MCI, yet retain the dominant classification for cellular carriers which are engaged in interstate services to an extremely limited extent by comparison.¹⁸

Clearly, neither the cellular industry nor any of its participants can be considered dominant in the interstate market.

Moreover, as shown above, the imposition of dominant carrier tariffing obligations on cellular service providers would be contrary to the public interest. Not only would such burdens require wrenching reorganization of existing business operations that were established to accommodate a competitive environment, they would be extremely costly to implement. As a result, resources would need to be redirected from more productive activities. It is, therefore, not surprising that nowhere in this nation are cellular carriers required to comply with existing and laborious regulatory burdens equivalent to those tariffing

¹⁷ See CTIA Petition at 19 n.47.

¹⁸ Id. at 20.

constraints associated with dominant carrier status under the Commission's rules.

Classification of cellular carriers as non-dominant also is consistent with the FCC's treatment of participants in telecommunications markets with similarly or even less competitive structures. For example, the Commission has tentatively declared local multipoint distribution service ("LMDS") providers to be non-dominant when operating in a duopoly market -- like cellular.¹⁹ The FCC has also classified even the sole MSS licensee as non-dominant because

**B. McCaw Agrees That Part 61 Should Be Amended
To Further Streamline The Tariff Filing
Procedures For Cellular Carriers**

McCaw strongly supports CTIA's requested revisions to the tariffing rules, particularly the elimination of cost support data and notice periods. Saddling cellular carriers with these incongruous burdens would seriously diminish the flexibility and competitiveness of the entire mobile communications marketplace. The net result would be detrimental to both consumers and the wireless industry.

Under the existing tariff rules, cellular carriers such as McCaw would be forced to file tariffs for all pricing and service modifications made in response to consumer demand. As the Commission has recognized, a notice period for such filings would adversely impact the marketplace by providing competitors with advance notice of marketing strategies and by restricting some carriers' ability to quickly respond to changing market conditions.²¹ Problematically, there would be no corresponding constraints on untariffed competitors.

services falling outside of the scope of the Commission's jurisdiction.

Specifically, Section 221(b) provides that:

[N]othing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communications, in any case where such matters are subject to regulation by a State commission or by local governmental authority.²⁴

Clearly, cellular service constitutes exchange service within the meaning of Section 221(b). Thus, mobile services that are essentially intrastate, with de minimus interstate extensions, are exempt from federal tariffing obligations. Radio waves, unable to conform to predetermined boundaries, will inevitably cross state borders.

Moreover, certain local cellular markets such as Kansas City, KS/Kansas City, MO, involve an interstate component by definition. Section 221(b) was intended to preserve state jurisdiction in such cases. The Commission has recognized

²⁴ 47 U.S.C. § 221(b) (1993)

this limitation on many occasions and should now reaffirm this long-standing policy.²⁵

V. CONCLUSION

From the initial authorization of cellular service, the Commission has recognized its unique characteristics, allowing cellular carriers to configure systems without regard to unwarranted regulatory strictures or traditional geographic boundaries. The Commission's forward-looking approach has been well-rewarded. Unfettered by inappropriate regulation, the cellular industry today is characterized by robust competition and beneficial service packages that meet

²⁵ See MTS/WATS Market Structure, 97 F.C.C. 2d 834, 882 (1984) (treat[ing] the mobile radio services provided by RCCs and telephone companies as local in nature); Mobile Radio Services, 93 F.C.C. 2d 908, 920 (1983) (because paging services have historically been local in nature, the states have traditionally regulated paging common carriers); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 59 Rad. Reg. 2d (P & F) 1275, 1284 (1986) ("cellular carriers are generally engaged in the provision of local, intrastate, exchange telephone service").

McCaw also recommends a broad and flexible construction of Section 221(b)'s "subject to state regulation" requirement. Specifically, McCaw believes that active state regulation is not required to remove cellular exchange services from FCC jurisdiction. This is consistent with the Commission's previous interpretation of the analogous phrase "subject to public regulation" as not requiring active regulation in its Computer II decisions. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C. 2d 384, 493 (1980), further proceedings, 84 F.C.C. 2d 50, 107 (1980), aff'd sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982).